IN THE

Supreme Court of the United States

October Term, 1976

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CL

No. 76-193

FRED G. MORITT,

Petitioner,

against

MAURICE H. NADJARI, KENNETH R. WOLFE, WILLIAM FEDERICI, JOSEPH MULLIN, JAMES HIGGINS, ADAM BUTCHER, JULES SACHSON, HYMAN LIPSON, JOSEPH HIRSCHMAN, person intended being the Foreman of the Grand Jury, "JANE ROE," person intended being the Secretary of the said Grand Jury, EUGENE GOLD and NICHOLAS SCOPPETTA,

Respondents,

SAM ROBERTS and NEW YORK NEWS, INC.,

Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS NADJARI, WOLFE, FEDERICI, HIRSCHMAN AND "ROE" IN OPPOSITION TO PETITION FOR CERTIORARI

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Preliminary Statement

Petitioner Fred G. Moritt seeks a writ of certiorari to review the judgment of the United States Court of Appeals

for the Second Circuit made and entered April 5, 1976 (KAUFMAN, Ch.J., ANDERSON and MESKILL, JJ.) reversing the order of the United States District Court for the Eastern District of New York (Chief Justice JACOB MISHLER) dated August 28, 1975, and dismissing petitioner's civil rights action against the respondents, instituted pursuant to 42 U.S.C. §§1938, 1985 and 1986. Petition for rehearing and for rehearing *en banc* was denied on May 14, 1976.

Opinions Below

The order and memorandum decision of the United States District Court, Eastern District of New York (Chief Judge JACOB MISHLER), dated August 28, 1975, is set forth in the appendix to petitioner's brief (1a-9a).

The order and memorandum decision of the United States Court of Appeals for the Second Circuit, dated April 5, 1976, and order of modification thereof, dated May 18, 1976, are set forth in the appendix to petitioner's brief (10a-12a, 13a).

The order and memorandum decision of the United States Court of Appeals denying rehearing, and denying rehearing *en banc,* are set forth in the appendix to petitioner's brief (14a, 15a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §1343(3).

Question Presented

Whether this Court's holding in *Imbler* v. *Pachtman,* 96 S.Ct. 984, is applicable in this case to bar petitioner's claim under 42 U.S.C. §§1983, 1985, 1986.

Statutes Involved

The statutes involved are 42 U.S.C. §§1983, 1985 and 1986, and are set forth in the appendix to petitioner's brief (16a-17a).

Statement of the Case

By an indictment (Ind. #SPO K-13-74) filed April 17, 1974, the Extraordinary Special Grand Jury for the County of Kings charged Fred G. Moritt, a judge of the Civil Court of the City of New York with the crimes of conspiracy in the third degree (N.Y. Penal Law §105.05 [McKinney 1967]), grand larceny in the second degree (N.Y. Penal Law §155.35 [McKinney 1967]), perjury in the first degree (two counts) (N.Y. Penal Law §210.15 [McKinney 1967]), and tampering with a witness (N.Y. Penal Law §215.10 [McKinney 1967]). Specifically, the indictment alleges that from June, 1972, to January, 1974, Moritt agreed and thereby conspired with Theodore Mann and others to commit the crime of grand larceny and in furtherance of that conspiracy to cause Mann "to be placed on the New York City payroll at a salary of $18,500 a year under the pretense that Mann would perform services as a Law Secretary in the Civil Court of the City of New York." According to this arrangement, Mann received this salary

and then made these funds available to Moritt for production of a play; in addition, Moritt hired a law school graduate at one hundred dollars per week to occupy a desk in his chambers and "create the impression that a Judge's Law Secretary was in attendance and performing work in the Civil Court." Consequently, from about September 18, 1972, to about January 24, 1974, the conspiracy netted Moritt a total of $26,050 stolen from the City of New York. The indictment further alleges that Moritt testified falsely before the grand jury concerning the "no show" job, and intentionally made a false statement to a grand jury witness attempting to affect the witness's testimony.

Subsequent to the filing of the indictment, Moritt moved in the New York Supreme Court, Appellate Division, Second Department (N.Y. Judiciary Law §149(2) [McKinney 1967]), for an order dismissing the indictment on the grounds (*inter alia*) that the Special State Prosecutor, who presented the case to the grand jury, did not have jurisdiction over the case; that the evidence before the grand jury was insufficient; and that he had engaged in various forms of misconduct. The Appellate Division, in a memorandum opinion dated November 12, 1974, denied the motion. *Moritt* v. *Nadjari,* 46 A.D.2d 784 (2d Dept. 1974).

Shortly after the denial of his initial motion to dismiss, Moritt petitioned the Appellate Division, Second Department, for an order pursuant to Article 78 of the New York Civil Practice Law and Rules prohibiting hs prosecution on the grounds that the state statutes allowing for an Extraordinary Term of the Supreme Court and for a Special Prosecutor were unconstitutional and that various state

statutes had rendered his offenses nonindictable. His petition was dismissed on the merits without opinion. *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Court of Kings County,* 46 A.D. 2d 1012 (2d Dept. 1974), *appeal dismissed,* 36 N.Y. 2d 911 (1975), *leave to appeal denied,* 37 N.Y. 2d 707 (1975). On December 15, 1975, the United States Supreme Court dismissed Moritt's appeal from the Appellate Division. 96 S.Ct. 557 (1975).

By a complaint dated April 14, 1975, Moritt brought the instant civil rights action in the United States District Court for the Eastern District of New York against the herein named people. The first count of the complaint alleged, pursuant to 42 U.S.C. §1983, that Nadjari, the special state prosecutor, and Wolfe, an assistant prosecutor, concealed from the grand jury evidence exonerating Moritt; that they misled the grand jury by calling witnesses who had no knowledge about events occurring after September, 1974; that they failed to tell the grand jury that Moritt's actions were governed by state court administrative rules and were not indictable; that they, along with the foreman and secretary, prevented Moritt from testifying or calling witnesses before the grand jury; that they tricked Moritt into appearing before the grand jury solely to "impact" him into a "baseless charge of perjury"; that they forged and materially altered the waiver of immunity signed by Moritt; that Nadjari, Wolfe, Federici, Roberts, and the *Daily News* disseminated inflammatory stories about Moritt prior to the indictment; and that Nadjari, Wolfe, and Police Officers Mullin, Higgins, Butcher, and Sachson arrested Moritt without probable cause, on a bench warrant issued before the indictment was filed, solely to prevent Moritt from effecting a citizen's arrest of Nadjari and Wolfe.

The second count alleged, pursuant to 42 U.S.C. §1985, that the defendants conspired to prevent Moritt from arresting Nadjari and Wolfe, and specifically that District Attorney Gold, Commissioner Scoppetta, and the police officers at various times failed to act on Moritt's complaints. The third count alleged, pursuant to 42 U.S.C. §1986, that Gold, Scoppetta, and the police officers, having knowledge of the wrongful acts about to be committed against Moritt, neglected to prevent them, and that Moritt thereby suffered serious damages. In conclusion, Moritt demanded ten million dollars in compensatory and special damages and ten million dollars in punitive damages.

Special State Prosecutor Nadjari, representing himself, Wolfe, Federici, Hirschman, and "Roe," moved to dismiss the complaint on the grounds that the court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted. Specifically, the defendants submitted that, as required by 42 U.S.C. §§1985 and 1986, Moritt failed to claim a denial of equal protection of the laws on the basis of racial or otherwise class-based discrimination; that the complaint concerned "violations, if any, of state, not constitutional law [which] are not proper subjects of a claim for relief under the Civil Rights Statutes"; that the allegations of the complaint were "too vague and unparticularized to state a constitutional claim"; that the purpose of the action was to seek review of the state proceedings in the Appellate Division, Second Department; and that the Special State Prosecutor, Special Assistant Attorney General, Grand Jury Foreman, and Grand Jury Secretary were immune from liability. District Attorney Gold moved to dismiss

on the same grounds, and Commissioner Scoppetta and the police officers moved to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted.

After oral argument on July 18, 1975, Chief Judge Mishler rendered a memorandum and order on August 27. The court noted that "While not all of the allegedly violated rights are of constitutional dimensions, as for example, the allegedly prejudicial press releases, *Martin* v. *Merola,* 389 F. Supp. 323 (S.D.N.Y. 1975), nevertheless the preponderance of the charges in Count 1 do allege sufficient constitutional violations to state a claim under §1983." The court further stated that the complaint should not be dismissed because it is "inartfully pleaded and the possibility of ultimate success may be remote * * *. It is not impossible, however unlikely, that plaintiff will be able to prove some of the facts which will support his claims." As to the question of immunity, the court said that "officials such as Nadjari and Wolfe * * * should not be permitted to escape responsibility for their misconduct by hiding behind the shield of immunity. Hirschman and 'Jane Roe' on the other hand, as foreman and secretary of the Grand Jury respectively, performed a judiciary function and are therefore immune from suit." Accordingly, the court granted the motion to dismiss count one as to the defendants Hirschman and "Jane Roe," and denied it as to Nadjari, Wolfe, Federici, and Police Officers Mullin, Higgins, Butcher and Sachson. The court dismissed counts two and three against all defendants on the grounds that the defendants therein were charged with committing purely discretionary official functions, not a racial or class-based deprivation of equal protection. The court included in its

order a statement that the sufficiency of the first count "presents a substantial ground for difference of opinion"; that "the trial will involve many complex issues," and that an "immediate appeal may materially advance the ultimate termination of the litigation."

On September 5, 1975, Judge MISHLER granted a stay of the federal proceedings pending defendants' appeal to the Second Circuit.

By an order dated October 9, 1975, the Second Circuit, acting pursuant to 28 U.S.C. §1292(b), granted Nadjari, Wolfe and Federici permission to appeal. On October 22, Moritt filed a notice of appeal from the dismissal of count one against Hirschman and "Jane Roe" and of counts two and three. The Special Prosecutor moved to dismiss the appeal as untimely. On November 20, 1975, the Second Circuit denied the motion with leave to renew it on appeal.

On April 5, 1976, the United States Court of Appeals for the Second Circuit (KAUFMAN, Ch. J., ANDERSON, MESKILL, JJ.), reversed the order and judgment of the District Court, insofar as it had sustained the first count of the complaint as to the respondents Nadjari, Wolfe and Federici, upon the ground that the petitioner's civil rights action brought pursuant to 42 U.S.C. §1983 was barred by this Court's holding in *Imbler* v. *Pachtman,* 96 S.Ct. 984.

On May 14, 1976, the Court of Appeals denied the petition for a rehearing, and for rehearing *en banc.*

POINT I

The prosecutors and grand jurors have absolute immunity from civil liability.

This Court has now definitively held that prosecutors receive absolute immunity from civil suit when the challenged activities were an integral part of the judicial process. *Imbler* v. *Pachtman,* 96 S.Ct. 984, *aff'g* 500 F. 2d 1302 (9th Cir. 1974). In that case, the plaintiff, relying upon the post-conviction findings of a federal court granting him a writ of habeas corpus, charged that the state prosecutor and investigators working at his direction had intentionally and negligently permitted perjured testimony against Imbler and suppressed evidence which would have exonerated him. The Supreme Court affirmed the dismissal of Imbler's complaint, holding that prosecutors, like judges and legislators, enjoy absolute immunity from suit for their official acts. Rejecting the claim that prosecutors should receive no more than the qualified immunity received by state executive officials, the Court wrote:

> "If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of a prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's ad-

> vocate. * * * Further, if the prosecutor is made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." At 992

Absolute immunity "defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Id.* at 989 n.13. Absolute immunity likewise applies to grand jurors. *Id.* at 991 n.20. *Imbler* v. *Pachtman, supra,* thus required the dismissal of the instant complaint against Nadjari, Wolfe and Federici of the Special Prosecutor's Office, as well as affirmance of the District Court's dismissal as to grand jurors Hirschman and "Roe."

The alleged wrongdoings by the prosecutors were undertaken pursuant to their official functions. Indeed, almost all the allegations involve the prosecutors' conduct as counsel to the grand jury and their duties under state law in presenting evidence, instructing the grand jury on the law, and receiving waivers of immunity from witnesses. *See* N.Y. Criminal Procedure Law §§190.25 (2)(a) and (6), 190.45, 190.50 (2), (3) and (6) (McKinney 1971). These activities fall within a prosecutor's "duties of initiating * * * a criminal prosecution," *Imbler* v. *Pachtman, supra,* at 990 and "deciding which suits to bring." *Id.* at 992. Moritt's additional allegation that defendants directed an arrest pursuant to a court-ordered bench warrant was automatically immunized as an act carried out under a court directive. Moreover, under *Imbler,* it was a necessary action in furtherance of commencing a criminal prosecution.

Notably, too, the claims in the instant case are utterly frivolous when compared to those in *Imbler,* in which a

crucial witness allegedly perjured himself on material matters. For example, Moritt submitted in the District Court statements of various persons as evidence of what was suppressed. The statements concern when these persons saw Theodore Mann, plaintiff's law secretary, in Moritt's chambers; they shed no light whatever on whether Moritt was diverting Mann's salary to his own use. Further, in *Imbler,* the plaintiff already had the benefit of a court decision holding that the prosecutor culpably used false testimony leading to plaintiff's conviction. In the instant case, however, most of Moritt's claims of misconduct, i.e., suppression of evidence, forgery, use of misleading evidence, improper legal instructions to the grand jury, have been, in one form or another, decided against him. *See, e.g., Moritt* v. *Nadjari,* 46 A.D. 2d 784 (2d Dept. 1974); *Matter of Moritt* v. *Extraordinary Special and Trial Term of Supreme Court of Kings County,* 46 A.D. 2d 1012 (2d Dept. 1974), *appeal dismissed,* 36 N.Y. 2d 911 (1975), *leave to appeal denied,* 37 N.Y. 2d 707 (1975), *appeal dismissed,* —— U.S. ——, 96 S.Ct. 557 (1975).

Finally, it appears that the dissemination of news releases, allegedly prejudicing Moritt's right to a fair trial, concerned either the crimes with which Moritt was charged or matters of public record, and did not connect him with unrelated criminal activity. *Cf. Martin* v. *Merola,* 532 F. 2d 191 (2d Cir. Feb. 5, 1976). As such, the alleged actions would also be immunized as taken pursuant to a prosecutor's duty to inform the public of pending criminal proceedings. In any event, as discussed more fully in Point II, *infra,* this Court in *Martin* v. *Merola, supra,* has ruled that such a claim must await the outcome of a criminal trial

before it can be determined that a fair trial was rendered impossible by the news releases.

In sum, the complaint alleges acts which are within the prosecutors' and grand jurors' scope of authority and which are thereby immunized. The court correctly held that the grand jurors are immune from suit. The complaint against Nadjari, Wolfe and Federici was correctly dismissed.

POINT II

The civil rights damage suit should await the outcome of the pending state criminal prosecution against Moritt.

Respondents contend that Moritt's civil rights damage suit was being improperly employed to secure both federal review of his state pretrial proceedings and discovery for his criminal trial. For this reson alone, the suit should be dismissed until the state criminal prosecution has been completed.

On February 5, 1976, this Court in *Martin* v. *Merola,* 532 F. 2d 191 (2d Cir. 1976), *vacating* 389 F. Supp. 323 (S.D.N.Y. 1975), directed that a similar suit be dismissed as premature. Specifically, this Court noted that the question of whether the right to a fair trial was violated by a prosecutor's dissemination of news releases could not be determined until after the state trial was completed. In addition to the practical necessity for awaiting the outcome of state proceedings, this Court noted that a federal court's inquiry into a pending prosecution would cause the same

interference as an action to enjoin a prosecution. As a matter of federalism and comity, such intervention is generally to be avoided. *See Younger* v. *Harris,* 401 U.S. 37 (1971); *Samuels* v. *Mackell,* 401 U.S. 66 (1971).

In the instant case, Moritt has made allegations of suppression of evidence in the grand jury, forgery of a waiver of immunity, arrest without probable cause, and, as in *Martin,* dissemination of prejudicial news releases. Most of these questions have been decided adversely to Moritt in pretrial proceedings in the Appellate Division, *see Moritt* v. *Nadjari,* 46 A.D. 2d 784 (2d Dept. 1974), and some are being litigated again in the state trial court. Whatever impact the alleged misconduct may have on Moritt's right to a fair trial can only be determined after the trial is completed. Moreover, all issues which have been preserved by the pretrial motions and proceedings can be raised on an appeal from a judgment of conviction. Finally, Moritt has submitted no claims of bad faith, inadequate remedy in the state courts, or blatantly unconstitutional statutes such as would permit a federal court to intervene in a pending state prosecution. *See Younger* v. *Harris, supra* at 48-55. All issues should first be resolved in the state trial and appellate proceedings before resort is had to the federal courts.

The Second Circuit further held that pretrial damage suits "represent a drain on already overextended judicial and prosecutorial resources." In addition,

> "* * * the requirement that defendants wait until criminal proceedings have terminated before asking a federal court for damages against the prosecutor will tend to eliminate those suits which might be brought for

purposes of harassment." *Martin* v. *Merola, supra* at 195.

In this context, Moritt's suit should clearly be dismissed. As noted above, the issues should first be resolved in the pending state proceedings. More importantly, Moritt's express design to use his interrogatories from the instant suit for his criminal defense constitutes not only a drain on prosecutorial resources, if not outright harassment, but a blatant misuse of the Civil Rights Act. The proper forum for pretrial discovery is in the state trial court.

In sum, the principles of practicality in litigation, comity and federalism, conservation of prosecutorial and judicial resources, and avoidance of harassment, as elucidated by this Court, all require dismissal of the complaint at this time.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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